Lim Siew Kim v Leow Ya Seng

HIGH COURT (KUALA LUMPUR) — SUMMONS NO S2-22-247 OF 1998
KAMALANATHAN RATNAM J
8 OCTOBER 1998

Succession *— Probate — Caveat on estate — Who bears onus to issue warning to caveator — Procedure and entry of caveat — Whether order granting probate notwithstanding caveat was a nullity — Rules of the High Court 1980 O 71 r 37*

This was a contentious probate action. The plaintiff, the widow of one Leow Tuck Chai, deceased had through her solicitors and pursuant to O 71 r 37 of the Rules of the High Court 1980 ('the RHC') filed a caveat on 10 August 1993 against the estate of the deceased Leow Tuck Chai and continued to renew the caveat. The first defendant, the executor of the deceased's estate, filed a petition for probate and obtained an order on 6 May 1994 from the senior assistant registrar ('the SAR'). The grant of probate was issued on 6 June 1994. The plaintiff subsequently filed an ex parte application seeking declarations, inter alia, that the order dated 6 May 1994 granting the probate be set aside and/or cancelled and for a further declaration that all transactions involving the deceased estate be held null and void. The plaintiff further prayed for an interlocutory mandatory injunction pending the hearing and disposal of the main action. The High Court, having considered the facts and nature of the injunctions sought, directed the plaintiff to serve the cause papers on the defendants and directed that the application be heard inter partes. Having been served with the papers, the defendants contended that they were never aware of the existence of the plaintiff's caveat. The defendant's case was also that the plaintiff had no capacity to sue and to seek the reliefs sought since she had filed a divorce petition against the deceased testator, and obtained a decree nisi on 25 February 1989. However, to date of hearing of the application, the decree nisi was not made absolute.

Held, dismissing the application:

(1) In this case, the caveator was not served with the required Form 174 being the 'Warning to Caveator' pursuant to O 71 r 37(8) of the RHC. The warning must emanate at the instance of any person interested or claiming under the estate ('the person warning'). In this case, that person ought to have been the first defendant. The onus falls squarely upon the person warning to issue the warning and he cannot plead ignorance of the law. A search ought to have been made of the court file before the first defendant or his solicitors requested the SAR to grant the order on 6 May 1994 or even before 6 June 1994 when the grant was issued. However, looking at the justice of the case, this is not a proper case where the court ought to hold that the order of the SAR granting the first defendant the

probate on 6 May 1994 was a nullity. The plaintiff had shown no evidence to date to be able to effectively support the retention of the caveat (see pp 339E–G, 340D–F).

(2) Considering the totality of the facts presented before the court, there were bona fide serious issues to be tried and the balance of convenience favoured the application being dismissed. The plaintiff's claim, which was really a claim for a greater share of the deceased's estate, was capable of being quantified in monetary terms. Hence damages ought to be adequate compensation (see p 341A–C).

Per curiam:

As soon as a caveat is entered and notification is given from the Central Registry to the registry hearing the grant of probate or letters of administration, the front cover of the file should be stamped with a chop:

Caveat No ...
Dari ... ke ...

This would enable the SAR to immediately note the existence and the period of the caveat. Each time a caveat is registered a fresh chop ought to be made on the file (see pp 339H–340A).

[Bahasa Malaysia summary

Ini merupakan tindakan probet yang dipertikaikan. Plaintif, balu seorang yang bernama Leow Tuck Chai, si mati telah melalui peguamcaranya dan menurut A 71 k 37 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') memfailkan suatu kaveat pada 10 Ogos 1993 terhadap harta pusaka si mati Leow Tuck Chai dan terus membaharui kaveat tersebut. Defendan pertama, wasi harta pusaka si mati, memfailkan petisyen untuk probet dan memperolehi perintah pada 6 Mei 1994 daripada penolong kanan pendaftar ('PKP'). Perintah probet dikeluarkan pada 6 Jun 1994. Plaintif kemudiannya memfailkan permohonan ex parte meminta deklarasi, antara lain, bahawa perintah bertarikh 6 Mei 1994 yang membenarkan probet diketepikan dan/atau dibatalkan dan untuk suatu deklarasi lanjut bahawa semua transaksi yang melibatkan harta pusaka si mati diputuskan tak sah dan terbatal. Plaintif seterusnya memohon suatu injunksi mandatori interlokutori sementara menunggu pembicaraan dan penyelesaian tindakan utama. Setelah menimbang fakta-fakta dan sifat injunksi yang dipohon, Mahkamah Tinggi mengarahkan plaintif menyampaikan kertas kausa ke atas defendan-defendan dan mengarahkan permohonan didengar secara inter partes. Setelah disampaikan dengan kertas tersebut, defendan-defendan berhujah bahawa mereka tidak pernah menyedari kewujudan kaveat plaintif. Kes defendan adalah juga bahawa plaintif tidak mempunyai keupayaan untuk mendakwa dan untuk meminta relief-relief yang dipohon memandangkan ia telah memfailkan petisyen perceraian

terhadap si mati pewasiat, dan telah mendapatkan dekri nisi pada 25 Februari 1989. Namun demikian, sehingga tarikh pembicaraan permohonan, dekri nisi tersebut tidak dijadikan mutlak. A

Diputuskan, menolak permohonan:

(1) Dalam kes ini, pengkaveat tidak disampaikan dengan Borang 174 yang perlu iaitu 'Amaran kepada Pengkaveat' menurut A 71 k 37(8) KMT. Amaran mestilah berpunca dari sesiapa yang berkepentingan atau yang menuntut di bawah harta pusaka ('orang yang memberi amaran'). Dalam kes ini, orang itu sepatutnya merupakan defendan pertama. Beban terletak pada orang yang memberi amaran dan ia tidak boleh menghujahkan kejahilan undang-undang. Carian sepatutnya telah dibuat ke atas fail mahkamah sebelum defendan pertama atau peguamcaranya meminta PKP memberikan perintah pada 6 Mei 1994 ataupun sebelum 6 Jun 1994 apabila perintah dikeluarkan. Namun demikian, dengan memperlihatkan keadilan kes, ini bukanlah kes yang wajar di mana mahkamah harus memutuskan bahawa perintah PKP yang memberikan defendan pertama probet pada 6 Mei 1994 adalah suatu pembatalan. Plaintif sehingga kini tidak menunjukkan keterangan yang boleh menyokong secara berkesan pengekalan kaveat itu (lihat ms 339E–G, 340D–F). B C D

(2) Dengan menimbang keseluruhan fakta-fakta yang dikemukakan di hadapan mahkamah, terdapat isu-isu bona fide yang serius untuk dibicarakan dan imbangan kemudahan (balance of convenience) memihak kepada penolakan permohonan tersebut. Tuntutan plaintif, yang sebenarnya merupakan suatu tuntutan untuk bahagian yang lebih besar ke atas harta pusaka si mati, boleh dihitung dalam bentuk wang. Justeru itu, ganti rugi haruslah memadai sebagai pampasan (lihat ms 341A–C). E F

Per curiam:

Sebaik sahaja suatu kaveat dimasukkan dan pemberitahuan diberikan daripada Pusat Pejabat Daftar kepada pejabat daftar yang mendengar perintah probet atau surat mentadbir, muka hadapan fail haruslah ditera dengan cap: G

No Kaveat ...
Dari ... ke ...

Ini akan membolehkan PKP mengambil perhatian dengan segara tentang kewujudan dan jangka masa kaveat. Setiap kali kaveat didaftarkan, cap yang baru patut dibuat atas fail tersebut (lihat ms 339H–340A).] H

Notes I

For cases on probate, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1971–2022.

Legislation referred to

Rules of the High Court 1980 O 71 rr 37(1), (2), (5), (6), (7), (8), (10), (11), (12), (14), O 71, r 38, O 92 r 4, Forms 173, 174, 175

Charles Hector (*Wee Choo Keong & Faaiz*) for the applicant/plaintiff.

KL Low (*Shamira Ally* with him) the respondents/defendants 1–5, 11–26 and 31–31.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff is the widow of one Leow Tuck Chui deceased who died on 2 February 1998. The plaintiff filed a divorce petition (Divorce Petition No S7–47–436–88) against the deceased respondent. The eleventh defendant herein was the named co-respondent. A decree nisi was granted on 25 February 1989. However, the same has not to date been made absolute.

The deceased died leaving a will. The first defendant filed a petition for probate No S5–32–85–94 and obtained an order on 6 May 1994 from the Senior Assistant Registrar ('SAR') of the High Court of Malaya and the grant was issued on 6 June 1994.

In the meantime, the plaintiff had, through her solicitors and pursuant to O 71 r 37 of the Rules of the High Court 1980 ('the RHC') filed a caveat No S5–47–93 on 10 August 1993 against the estate of the deceased Leow Tuck Chui and has continued to renew the said caveat.

Case for the plaintiff

The plaintiff contends that in spite of the existence of the said caveat, the SAR of the High Court of Kuala Lumpur proceeded to hear and grant the order and finally issued out the probate. It is the plaintiff's case that this order is void and is a nullity and thus the plaintiff prays for various declarations in her suit filed against the 31 defendants.

The plaintiff then proceeded to file this application encl 3 for various declarations and injunctions against defendants 1–5, 11–26, 30–31. The declarations sought inter alia are that the order dated 6 May 1994 granting the probate be held invalid or void and alternatively that the said order and the grant of probate be set aside and/or cancelled and for a further declaration that all transactions involving the deceased estate be held null and void. There is also a prayer for an interlocutory injunction pending the hearing and disposal of the main action. The interlocutory mandatory injunctions, addressed to those of the defendants, being the executors, beneficiaries, companies and banks, where the assets of the deceased estate was supposed to be, sought inter alia, the disclosure to the plaintiff of those assets of the estate of the deceased in each of their possession and control, and if still in their possession for each of them to hold the same and not

dispose of, sell, transfer, etc those assets until the disposal of the main action; and in the event that any of the defendants had already disposed of, transferred or sold them, an order was sought for such of the defendants involved, to furnish information and details of such transactions.

Case for the defence

The defendants contend that they were never aware of the existence of the plaintiff's caveat. They only became aware of the said caveat when the plaintiff filed an originating summons in October 1997 seeking a copy of the original will of Leow Tuck Chui deceased. The defendants averred that when they were served with a citation on 3 January 1998 they had deposited the original grant of probate into court to enable the citator to act.

The defendants contended that since the nature of the plaintiff's prayers amounted in essence to this court granting a mandatory injunction, the plaintiff should specifically plead and pray for such mandatory injunctions, instead of relying on the inherent powers to grant such orders under O 92 r 4 of the RHC. This is in respect of the prayer that all monies and/or share certificates that were part of the estate of the deceased be paid into court. The defendants' case was that the plaintiff had no capacity to sue and to ask for these prayers. It is the case of the defendants that a decree nisi once pronounced is final and takes effect at the time it is pronounced and that the issue of the decree nisi not being made absolute is irrelevant.

Findings of the court

The plaintiff came before me for an ex parte order. However, having considered the facts and the nature of the injunctions sought I directed the plaintiff to serve the cause papers on the defendants and directed that the said application be heard inter partes.

The caveat

Any person who wishes to ensure that no grant is made without notice to him, may enter a caveat (O 71 r 37(1) of the RHC) by filing the caveat in Form 173 of the RHC, in the registry. When a caveat is entered, the registrar must forward a copy of the caveat and give notice in Form 167 to the Registrar of the Principal Registry (O 71 r 37(2)). A caveat shall remain in force for 6 months from the date on which it is entered and shall then cease to have effect, without prejudice to the entry of further caveat(s) (O 71 r 37(5)). The Registrar of the Principal Registry shall maintain an index of caveats entered in all registries and on receiving a notice of an application for a grant made in any registry or to a collector he shall cause the index to be searched and shall notify the appropriate registrar or collector in the event of a caveat having been entered against the sealing of a grant for which application has been made in the registry or to the collector (O 71 r 37(6)). Subrule (7) states that the registrar must not make any grant if he has knowledge of an effective caveat in respect thereof provided that no caveat shall operate to prevent the making of a grant on

A the day on which the caveat is filed. A caveator may be warned by the issue from the registry of a warning in Form 174 at the instance of any person interested ('the person warning') which must state his interest and, if he claims under a will, the date of the will, and must require the caveator to give particulars of any contrary interest which he may have in the estate of the deceased; and every warning of a copy thereof must be served on the B caveator and the Registrar of the Principal Registry (O 71 r 37(8)). A caveator having an interest contrary to that of the person warning may, within 8 days of service of the warning upon him inclusive of the day of such service, or at any time thereafter if no affidavit has been filed under sub-para (12) enter an appearance in Form 175 in the Registry, and must serve C on the person warning and the Registrar of the Principal Registry a copy of it sealed with the seal of the court (O 71 r 37(10)). If the time limited for appearance in Form 175 has expired and the caveator has not entered an appearance, the person warning may file in the Registry an affidavit showing that the warning was duly served and that he had not received a summons for directions to be issued pursuant to sub-para (11) and thereupon the D caveat shall cease to have effect. Upon an appearance being entered in answer to the warning of caveat the matter shall be deemed to be contested and the expense of entry of such caveat and the warning thereof shall be considered as costs in the cause (O 71 r 37(14)). Every contested matter must be referred to a judge who will then direct its disposal (O 71 r 38).

E

The warning pursuant to O 71 r 37(8)

It is obvious that in this case the caveator was not served with the required Form 174 being the 'Warning To Caveator' pursuant to sub-r (8). The rule states that the warning must emanate at the instance of any person F interested or claiming under the estate called 'the person warning'. Obviously the person in this case ought to have been the first defendant. In the present case, the defendants aver that they were unaware of the existence of the continuous caveats. Obviously, the existence of the caveat must be drawn to the attention of the Registrar who could, pursuant to O 71 r 37(7), refuse to grant the order. The onus falls squarely upon the G person warning to act, to issue out the warning. The defendants cannot plead ignorance of the law. A search ought to have been made of the file before the first defendant or his solicitors requested the registrar on 6 May 1994 to grant the order or even before 6 June 1994 when the grant was issued.

H It is in my view, necessary to suggest guidelines for the senior assistant registrars who have to hear applications for the grant of probate or letters of administration. It is suggested that as soon as a caveat is entered and notification is given from the Central Registry to the Registry hearing the grant of probate or letters of administration, the front cover of the file be stamped with a chop:

I

Caveat No ...

Dari ... Ke ....

This will enable the SAR to immediately note the existence and the period of the caveat. Each time a caveat is registered a fresh chop ought to be made on the file. I understand that presently the caveat in Form 173 of the RHC when sent to the registry hearing the application for the grant of probate or letters of administration is merely given an enclosure number and kept in the file. Little wonder that unless the existence of the caveat is drawn to the attention of the learned SAR it can be invariably overlooked, like in this case.

What was the purpose of entering the caveat?

Before I decide on the issue as to whether the order granting the probate was a nullity, it is only just that I look at the reason for entering the caveat. The plaintiff is challenging the will on the basis that it is a forgery. However, to date no credible evidence has been tendered to this court to support the allegation of forgery. No other reason has been proffered to challenge the will. The plaintiff had by way of Originating Summons No S3–24–460–97 obtained an order on 8 September 1997 for the said will to be sent to the Chemistry Department for signature analysis. To date there has been no response.

Looking at the justice of the case, I do not think this is a proper case where I ought to hold that the order of the SAR granting the first defendant the probate on 6 May 94 was a nullity. Even though I had already held that the duty was on the first defendant and/or his solicitors to have made a search of the file before seeking the order of grant of probate, it is my judgment that even assuming the first defendant (the person warning) had issued Form 174 being the warning to the caveator and upon the plaintiff entering appearance, the matter would then be fixed before the judge for disposal. The plaintiff has shown no evidence to date to be able to effectively support the retention of the caveat. In the circumstances, it is my judgment that I will not, for the purposes of this application only, grant the declaration sought by the plaintiff.

With regard to the prayers for injunctions, I also decline to grant the prayers sought.

There is clear evidence that the first defendant has completely distributed and dealt with the assets of the deceased four years ago pursuant to the will, save and except for the dispositions made to the plaintiff and to her children, namely, defendants 27, 28 and 29. The first defendant says he is currently holding the monies due to the plaintiff and to the named children, as trustee, and that he is ready to release the said sums upon demand. The plaintiff has made no allegation of undue or improper administration of the estate. The attestation of the will was witnessed by two solicitors.

The very fact that the plaintiff now contends that she is still the legal and lawful wife of the deceased because the decree nisi has not to date been made absolute, clearly gives her the right and capacity to maintain this action. Whilst I do not intend to make a finding on this issue at this stage, I am satisfied that on the basis of the decision of the Court of Appeal in

Keet Gerald Francis Noel John v *Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (CA) and considering the totality of the facts presented before this court, there are bona fide serious issues to be tried. However, in considering where the justice of the case lies and considering all practical realities of the case before me and after covering all matters and bearing in mind that I am asked to exercise my discretion, I hold that for the purposes of disposal of this application, the balance of convenience favours my dismissing this application.

After all, since the assets have all been dissipated, the grant of an injunction would be nothing more than a Pyrrhic victory. I am satisfied that all that the plaintiff is seeking through the attempted revocation of the grant of probate, is a greater share of the deceased's estate which to my mind, is capable of being quantified in monetary terms. Damages ought to be adequate compensation in this case.

Application dismissed.

Reported by Andrew Christopher Simon